

In The
Supreme Court of the United States
October Term, 1991

LAWRENCE C. PRESLEY, individually
and on behalf of others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK, and NATHANIEL GOSHA, III,
individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court
For The Middle District Of Alabama

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July 1991

QUESTIONS PRESENTED

These consolidated cases present variations on the following basic question: What principles govern the power of local district courts to interdict the preclearance process under § 5 of the Voting Rights Act, 42 USC § 1973c, by ruling that particular changes are beyond the scope of the Act and need not be submitted for preclearance? The Act reserves to the U.S. District Court for the District of Columbia and/or the Attorney General of the United States plenary authority to determine whether changes affecting voting violate § 5. Local district courts are limited in § 5 cases to determining whether particular changes are within the scope of the Act and to enjoining voting changes that have not received the required preclearance.

1. Did the Alabama district court improperly determine to be beyond the scope of § 5 a resolution or act which removes from individual county commissioners the power independently to manage road and bridge work in each commissioner's respective district and places that power in the hands of either the entire seven-member commission or a county engineer appointed by the entire commission?

2. Did the Alabama district court impermissibly confuse substantive questions of § 5 violation with questions about the scope of statutory coverage when it held:

QUESTIONS PRESENTED - Continued

a. that reallocations of authority of elected officials "will normally have to be shown to involve officials with different voting constituencies" before § 5 preclearance is required;

b. that a change in the authority of individual county commissioners need not be submitted for § 5 preclearance if it is "insignificant in comparison" to the county commission's authority over other matters; and

c. that, even though an unprecleared 1979 law now shows an obvious potential for discrimination, it need not be submitted for § 5 preclearance?

3. Did the Alabama district court overstep its limited statutory authority by refusing to defer to determinations by the U.S. Attorney General that the changes in question do fall within the scope of § 5 of the Voting Rights Act and thus should be submitted for preclearance?

PARTIES IN COURT BELOW

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission.

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OPINIONS BELOW

The opinion of the district court is unreported. The opinion of the district court is reproduced beginning at JS A-1. The order denying the motion to alter or amend the judgment is reproduced beginning at JS A-42.¹

JURISDICTION

The district court denied the requested injunction on 1 August 1990 and denied the motion to alter or amend the judgment on 21 August 1990. The appellants filed their respective Jurisdictional Statements in this Court on 26 October 1990. This appeal is taken under 28 USC § 1253.

STATUTORY PROVISIONS

Section 5 of the Voting Rights Act of 1965 (42 USC § 1973c) is reproduced beginning at JS A-45. The Road Supervision Resolution and the Common Fund Resolution, adopted by the Etowah County Commission, are reproduced at A-48 and A-50, respectively, in the *Presley* Jurisdictional Statement. Alabama Act 79-652 is reproduced beginning at A-48 in the *Mack* Jurisdictional Statement.

¹ Unless otherwise noted, references to "JS" may be found in either Jurisdictional Statement at the cited page.

STATEMENT OF THE CASE

In 1964 the practice in both Etowah County and Russell County was that (1) the County Commission was elected at-large from residency districts; (2) the County Commission as a whole adopted a budget that divided the various road and bridge funds among the county commissioners in approximately equal amounts;² (3) each commissioner had a free hand to determine the priorities of road and bridge repairs in his or her district; and (4) each commissioner oversaw the work of his or her own road crew. The two enactments in question here change the manner of sharing political power on the commission from one in which each member controlled a portion of the budget, with which he or she could satisfy constituent demands for road repairs, to a system that gives the white majority effective control over every decision concerning the road and bridge system.

Presley v Etowah

The Adoption of Single-Member Districts

Before 1986, Etowah County was governed by four commissioners elected at large from residency districts plus a chair elected at large. In 1986 the United States District Court in the Middle District of Alabama found that Alabama's general at-large statute applicable to

² Under Alabama law, many taxes are earmarked for the support of particular governmental functions. In these counties the principal sources of funds for the repair and construction of roads and bridges were the "7¢ gas tax" and the "Three-R tax."

Etowah County Commission (and several others) was invalid under § 2 of the Voting Rights Act of 1965³ because the legislation had adopted and amended the statute with a racially discriminatory purpose.⁴ To remedy unlawful dilution of black voting strength caused by the prior at-large election system, later that year the Court approved a consent decree providing for the enlargement of the Etowah County Commissioners from five members elected at large to six members elected from single-member districts.⁵ The consent decree divided the County into six districts, with the single-member district elections held over a four-year period, as the terms of the incumbents expired.⁶ Paragraph 3 of the *Dillard* consent decree provided:

³ Section 2 of the Voting Rights Act of 1965, 42 USC § 1973, provides in pertinent part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial of abridgment of the right of any citizen of the United States to vote on account of race or color

⁴ *Dillard v Crenshaw County*, 640 FSupp 1347, 649 FSupp 289 (MD Ala 1986).

⁵ *Dillard v Crenshaw County*, CA No. 85-T-1332-N (MD Ala, 12 November 1986). The Commission has been expanded to seven members until 1993, to allow the at-large chairman to complete his term.

⁶ Districts 5 and 6 were the only ones to elect representatives in the special, court-ordered elections in December 1986. Commissioners Presley and Williams took office in January 1987. Single-member district elections were held in Districts 2 and 3 in the regular 1988 elections, and in Districts 1 and 4 in 1990. All the Old four were re-elected.

When the District 5 and 6 Commissioners are elected in the special 1986 election, they shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at-large, until their successors take office.

New District 5 is the only district that is majority black. Plaintiff Presley, who is black, was elected by the voters of District 5 in a special election in December 1986; Billy Ray Williams, who is white, was elected from District 6. All five of the pre-1986 incumbent commissioners were white. According to the 1990 Census, the population of Etowah County is 13.8% black.

The Former System for Road Work

Under the at-large election system, the commissioners met one day a week to carry out the few legislative responsibilities they had as a body. During the other 90 percent of their official time, they were physically present in their respective districts running their respective road and bridge operations. Hitt Depo. at 10-11.⁷ The chair was the only commissioner who worked at the courthouse. The chair managed the courthouse buildings and grounds and supervised the financial records but had no part in the road and bridge operations. Hitt Depo. at 15, 24.

The four associate commissioners were "road" commissioners; their residency districts were administrative

⁷ The case was submitted to the three-judge court on depositions and exhibits, so there is no formal transcript of a trial.

"road" districts, and each had virtually unfettered authority to run the road and bridge operations in his district (all Etowah County commissioners have been males). Each road commissioner had sole management authority over all construction and repair of roads, bridges and the like in his district, including equipment, employees, and road subcontracts. Hitt Depo. at 10-11. Each commissioner had a shop in his district and controlled his own budget; road and bridge funds were divided equally among the four road districts. Hitt Depo. at 20-25. Some decisions such as contracts had to be approved by the entire commission, but the commission always deferred to the choices of the commissioner in whose district the work would be performed, according to the testimony of Chairman Hitt. JA 54. Chairman Hitt had lost his supervisory powers over the road and bridge budget as a result of a local act passed in 1985. Hitt Depo. at 17, 20.

The construction and maintenance of roads and bridges is the one area of county government over which the county commission has effective political discretion. The commission has no taxing authority. JA 64. It is completely dependent on revenues established by state law and mostly received from state agencies. JA 55-57. A review of the county's budget shows that virtually all the general fund and all other special funds are dedicated to predetermined spending requirements and/or are controlled by other elected officials, such as the sheriff, the probate judge, tax assessor, etc. E.g., Pl. Ex. L.

The Reaction of the Incumbents to the New Commissioners

When the District 5 and 6 commissioners took their seats in January 1987, the four incumbent at-large commissioners ("the Old Four") refused to yield any of their road and bridge powers, notwithstanding the requirement of the *Dillard* decree. The Old Four continued to operate as though there were no new members of the commission. The Old Four agreed on the road and bridge budget among themselves and submitted it directly to the county clerk, Commission Chairman Hitt testified. Hitt Depo. at 29. They informed the new members (by a "To Whom It May Concern" letter) that the commissioners for Districts 1 through 4 "agree to do the maintenance on all the county roads in District 5 and District 6. . . ." Pl. Ex. Y.⁸ In effect, the Old Four commissioners banished Presley, Williams, and Chairman Hitt to political limbo. Chairman Hitt testified that Presley was left with no administrative duties at all. Hitt Depo. at 74.

The 1987 Resolutions

The Old Four formalized their monopoly over road and bridge operations in the resolutions at issue in this action, adopted 25 August 1987. One resolution ("the Road Supervision Resolution"), adopted over the objections of the new commissioners, provides that each of the Old Four commissioners "shall oversee and supervise the

⁸ The case was submitted to the district court on depositions and exhibits, so there is no record citation to the introduction and admission of exhibits as usually required by Supreme Court Rule 24.5.

road workers and the road operations assigned to the road shop[s] located in District 1[, 2, 3, and 4]" and "shall jointly oversee, with input and advice of the County Engineer, the repair, maintenance and improvement of the streets, roads and public ways of all of Etowah County." Road Supervision Resolution, ¶¶ 1-4, and 7 (JS A-48). The resolution used the numbers of the old rural districts, even though one of the road shops is now located in Presley's District 5. That resolution assigned Commissioner Presley to "oversee and supervise maintenance employees and the repair, maintenance and operation of the Etowah County Courthouse" and the other new commissioner to "oversee and supervise the employees of the Engineering Department of Etowah County and the operations of that department." Road Supervision Resolution, ¶¶ 5 and 6 (JS A-48). It further directed the two new commissioners to "jointly oversee the maintenance and operations of the Etowah County Farmers Market." Road Supervision Resolution, ¶ 8 (JS A-48). Even though one of the four road shops is now physically located in the majority black district represented by appellant Presley, the District 2 commissioner continues to supervise it.

The second resolution ("the Common Fund Resolution"), also adopted over the objections of Presley and Williams, formalized the control of the Old Four commissioners over the entire road and bridge budget. Continuing the pre-resolution and pre-*Dillard* practice of allocating the road and bridge budget equally among all commission districts would have required six shares instead of four. So the Old Four resolved to discontinue formal allocation of the budget among the districts. They

instituted a new common fund that the Old Four would control jointly, as a formal matter, and that they could reallocate among themselves informally.

[A]ll monies earmarked and budgeted for repair, maintenance and improvement of the streets, roads and public ways of Etowah County [shall] be placed and maintained in common accounts, not be allocated, budgeted or designated for use in districts, and [shall] be used county-wide in accordance with need,

Common Fund Resolution, ¶ 1 (JS A-49). This second August 1987 resolution made the Old Four's monopoly explicit by assigning control of the road work to "the road workers of Etowah County operating out of the four present road shops located in the County." Common Fund Resolution, ¶ 2 (JS A-49). The remnants of the formal allocation of the road and bridge budget among Districts 1-4 were retained in a grandfather clause, which preserved the control of each at-large incumbent over any unspent FY 1986-87 monies in his road district budget. Common Fund Resolution, ¶ 3 (JS A-49).

Each September when the commission adopts the annual county budget, the "no" votes of Presley and Williams have no effect whatsoever on the Old Four's plans for road and bridge operations. Pl. Exs. Q, M and L. The Old Four make up the road and bridge budget among themselves, send it directly to the county clerk bypassing the Chairman and District 5 and 6 commissioners, and then vote their budget through with their solid, four-vote majority. JA 58; Hitt Depo. at 29, 32-34; Pl. Exs. Q, M, and L. Informally, the Old Four continue the old practice of allocating control over equal shares of the road and bridge budget among themselves. JA 76-77.

The Old Four divided \$1.4 million among their four districts in FY 1987, \$1.9 million in FY 1988, and \$2.1 million in FY 1989. JA 76. Each of the Old Four has virtually unfettered authority over his one-fourth of the road and bridge budget. Each decides how the money is to be spent, whom to hire, whom to promote, and with whom to contract. JA 58-59; Hitt Depo. at 32, 63, 68-69; Presley Depo. at 10-11. The county clerk continues to report the amount of road and bridge funds spent in each of the four former districts, with no road and bridge expenditures in Districts 5 and 6. The District 5 and 6 commissioners must come, hat in hand, to one of the Old Four to plead their case for road work within their districts. Hitt Depo. at 71; Presley Depo. at 23-32.

The Present Suit

Commissioner Presley, representing a class of black citizens in Etowah County, sued to enjoin the enforcement of the two resolutions unless they were precleared under § 5 of the Voting Rights Act.⁹ A three-judge district

⁹ Appellants Presley, Mack, and Gosha and William America (Escambia County commissioner) had earlier brought suit under § 2 of the Voting Rights Act and Title VI of the Civil Rights Act of 1964. Presley claimed that the two Etowah county resolutions were being administered in a discriminatory way. Mack and Gosha claimed that the county unit plan in Russell County was being administered in a discriminatory way. Later, when they discovered that the resolutions and the change to the county unit plan had not been submitted for preclearance, they amended their complaint to ask for relief under § 5. Their other claims (under § 2 of the Voting Rights Act) are still pending in the district court. Commissioner America dismissed his claims against Escambia County.

court issued an injunction against only the Road Supervision Resolution. The district court held that "the potential for discrimination posed by" the Road Supervision Resolution "is blatant and obvious;" that the "resolution stripped the voters in districts 5 and 6 of any electoral influence over . . . commissioners" responsible for road management, JS A-20. It therefore enjoined the enforcement of the Road Supervision Resolution unless Etowah County obtained preclearance of it within 60 days, JS A-28. Etowah County has not submitted the Road Supervision Resolution to the Attorney General or the District Court for the District of Columbia.

The district court, in a split opinion, held that Etowah County did not need to submit the Common Fund Resolution for preclearance for the following reasons:

It is true that the reallocation of authority embodied in the common fund resolution involved officials with different voting constituencies. . . . We conclude, however, that the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant in comparison to the entire Commission's authority, both before and after the disputed change, to allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need.

JS A-18-19. One district judge dissented from this conclusion, JS A-32 *et seq.* Judge Thompson focused on the way in which the commissioners actually used their powers and concluded, "A commissioner's real authority lies . . . in how those funds are used after they are allocated."

JS A-32. The district court unanimously agreed that the Road Supervision Resolution should be enjoined unless it were submitted for preclearance. JS A-20-21 and A-27.

Mack v Russell County

Alabama Act 79-652 transferred from the Russell County Commissioners to the Russell County Engineer all functions, duties, and responsibilities for roads, highways, bridges, and ferries. This centralized control is called "the unit system" in Alabama. Before the Act passed, each commissioner had controlled the road work in his or her own district.

Despite its transfer of important governmental functions from the supervision and control of elected county commissioners to the (appointed) county engineer, neither the County Commission nor any State official submitted Act 79-652 for preclearance. The Department of Justice made a written request in 1989 that it be submitted. When the County refused to do so, the appellants Mack and Gosha brought this action.

At the time the 1979 act was adopted, the Russell County Commission consisted of five commissioners elected at large from four residency subdistricts; three rural districts had one commissioner each and Phenix City (the largest city in the county) had two seats on the commission. The commissioners residing in the rural districts exercised exclusive discretion and control over the road shops, road equipment, materials, expenditures and employees in their respective districts. Each commissioner was responsible for maintaining a county workshop and for maintaining a road crew. Belk Depo. at 18;

Adams Depo. at 16. Before the adoption of the unit system, each "commissioner had a road crew that he was in charge of and that he - even though he had a foreman, you know, he made the assignments and pretty generally called the shots on what work was done and where and so forth." Adams Depo. at 11. Former Representative Charles Adams was the primary sponsor of Act 79-652.

Each commissioner also controlled hiring, firing, and assignment of personnel in his or her road shop. Belk Depo. at 12. This amounted to substantial employment authority, because the road and bridge system is a major employer in Russell County government. Adams Depo. at 22. Road and bridge expenditures represent the majority of the county's budget and of public monies over which the county government exercises discretionary authority. The budget of the county engineer is \$1.8 million. McGill Depo. I at 18. Before implementation of Act 79-652, appropriations from the budget were made on the basis of road and bridge districts. McGill Depo. I at 18, 19, 22.

In May 1979, the Russell County Commission adopted a resolution that placed all county road construction, maintenance, personnel and inventory under the supervision of the County Engineer and requested the Russell County legislative delegation to enact this change as law. Def. Ex. 1, Belk Depo. In July 1979 the Alabama Legislature passed Act 79-652, which converted the process for governing the road and bridge budget and operations to a "unit system." The Act provides:

All functions, duties and responsibilities for the construction, maintenance and repair of public roads, highways, bridges and ferries in Russell

County are hereby vested in the county engineer, who shall, insofar as possible, construct and maintain such roads, highways, bridges and ferries on the basis of the county as a whole or as a unit, without regard to district or beat lines.

The Russell County Commission is now composed of seven commissioners elected from single-member districts, under a consent decree entered 17 March 1985, in *Sumbry v Russell County*, CA No. 84-T-1386-E (MD Ala). The decree provided for elections from single-member districts beginning in 1986 and was designed to remedy unlawful dilution of black voting strength caused by the prior at-large election system. Nathaniel Gosha, III, and Ed Peter Mack, the first black county commissioners in Russell County history, were elected in 1986 from Districts 4 and 5, respectively, each of which has a black voter majority. According to the 1990 Census, the population of Russell County is 38.6% black.

Commissioners Mack and Gosha (appellants in this Court) petitioned the district court for an injunction to restrain appellee Russell County Commission from implementing Act 79-652, unless the statute receives pre-clearance under § 5 of the Voting Rights Act, 42 USC § 1973c.¹⁰ The district court ruled Russell County did not have to submit Act 79-652 for preclearance. JS A-16-18. Judge Thompson dissented, partly on the grounds that the at-large commissioners were *de facto* accountable to the voters in their respective districts. Thus, he argued, there had been a shift of responsibility from district commissioners to an appointed at-large official. JS A-34-35.

¹⁰ See footnote 9.

ARGUMENT

SUMMARY OF ARGUMENT

Section 5 of the Voting Rights Act of 1965 prohibits a covered State or locality from implementing any change in its standards, practices, or procedures with respect to voting until it obtains preclearance – that is, a determination that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race – from the Attorney General of the United States or the District Court for the District of Columbia. The purpose of § 5 was “to shift the advantage of time and inertia from the perpetrators of the evil to its victims,” *South Carolina v Katzenbach*, 383 US 301, 328 (1966).

A local three-judge district court must determine only whether the voting change in question has a “potential for discrimination.” *Dougherty County Board of Education v White*, 439 US 32, 42 (1978). This Court intended for local district courts to limit their inquiry to the nature of the voting-law change, not to search for discrimination in the circumstances of the particular factual situation.

— Congress drafted § 5 to centralize consideration of the substantive preclearance issues in two fora: the District Court for the District of Columbia and the Attorney General. To reverse the time-consuming, expensive, and legally burdensome case-by-case method of challenging proliferating changes in voting practices case by case, Congress also placed all the burdens of proof and delay on the covered jurisdictions. The district court below fundamentally frustrated this statutory enforcement scheme and exceeded its jurisdiction by engaging in substantive consideration of the merits of the changes in

question and placing the burden of proof on the private plaintiffs.

The district court below acknowledged that “‘reallocation[s] of authority’ among government officials or bodies *may* constitute changes affecting voting under section 5.” JS A-10 (emphasis added). The district court should have proceeded no further once it found that the changes at issue had “the *nature* of the changes in election practices . . . which required preclearance. . . .” *McCain v Lybrand*, 465 US 236, 250 n.17 (1984) (emphasis added). *Every* change affecting voting is required by statute to receive preclearance, even one that seems innocent of discriminatory purpose or effect. Only the D.C. District Court and the Attorney General are empowered to declare the change free of discrimination. The District Court foreclosed that consideration.

The changes in this case reallocate significant power from each commissioner to the whole commission (acting by majority vote) or to an official appointed by the whole commission. This Court has held that such power reallocations must be submitted for preclearance under § 5. *Allen v State Board of Elections*, 393 US 544 (1969); *McCain v Lybrand*, 465 US 236 (1984).

The reasons cited by the Alabama district court for refusing to require Section 5 preclearance of the challenged changes went beyond the narrow question of the Act’s scope and impermissibly involved the local court in substantive issues of whether violations exist: (1) the Russell County change affected officials responsible to the same electoral constituency; (2) one Etowah County

change seemed relatively insignificant to the court majority; and (3) even though the Russell County change has an obvious discriminatory impact today, the potential for discrimination would not have been as obvious in 1979 when the law was enacted. The district court's analyses were wrong even as matters of substantive law. But these are questions Congress has reserved exclusively for the District of Columbia court and the Attorney General, and the Alabama district court exceeded its statutory authority even by considering them.

The district court should have accorded deference to the decision of the Attorney General that the changes in this case must be submitted under § 5. This Court has held that the Attorney General's decisions on coverage of the Act are entitled to great deference and has specifically relied upon the Attorney General's decisions to apply § 5 to certain election-law changes. *United States v Sheffield Board of Comm'rs*, 435 US 110 (1978); *NAACP v Hampton County Election Commission*, 470 US 166, 179 (1985); *Dougherty County Board of Education v White*, 439 US 32, 39 (1978); *Perkins v Matthews*, 400 US 379, 390-94 (1971).

The Russell County Commission had changed to a "unit system" in 1979, but had never submitted the change for preclearance. In 1985 the Commission changed from at-large elections to single-member districts. In assessing the 1979 unprecleared change, the court below looked only at the conditions immediately "before and after the 1979 change," JS A-21, when the county commission was still elected at large. In *City of Rome v United States*, 446 US 156 (1980), this Court explained that when a change is not submitted until years after its enactment, the change is to be analyzed in light of the now-existing

system rather than in light of the system existing at the time the unprecleared change was enacted. The Justice Department regulations are to a similar effect. 28 CFR § 51.54(b).

I. The district court misapplied the "potential for discrimination" test and decided the substantive issues reserved for the Attorney General or the District Court for the District of Columbia.

Section 5 of the Voting Rights Act of 1965 prohibits a covered State or locality from implementing any change in its standards, practices, or procedures with respect to voting until it obtains from the Attorney General of the United States or the District Court for the District of Columbia a determination that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race.¹¹ "The legislative

¹¹ Section 5 of the Voting Rights Act of 1965, 42 USC § 1973c, provides, in pertinent part:

Whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, . . . and unless and

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history [of § 5] on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Allen v State Board of Elections*, 393 US 533, 566 (1969).

A. The "potential for discrimination" test looks to the nature of the change in the voting law, not to its particular circumstances in the jurisdiction.

Under the § 5 case law, a local district court must determine only whether the voting change in question has a "potential for discrimination." *Dougherty County Board of Education v White*, 439 US 32, 42 (1978). If such a potential exists the local court's responsibility is at an end: it must simply enjoin the practice; it cannot determine whether the potential has been realized. In this case the district court improperly used the "potential for discrimination" standard as an inquiry into the plaintiffs' likelihood of success on the merits.

This Court's decisions on "potential for discrimination" reveal that it intended the local district courts make an inquiry into the nature of the voting-law change, rather than into the circumstances of the particular factual situation. This Court first used the "potential for discrimination" rubric in *Dougherty*, 439 US 32, 42 (1978):

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until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure

"Thus, in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a potential for discrimination." The first clause of that formulation negates any inquiry into the eventual outcome of the preclearance process. The Court made this point even more forcefully by the cases it cited in support of its proposition: *Georgia v United States*, 411 US 526, 534 (1973); *Perkins v Matthews*, 400 US 379, 383-385 (1971); *Allen v State Board of Elections*, 393 US 544, 555-556, n 19, 558-559, 570-571 (1969). See, *Dougherty*, 439 US at 42.

In *Georgia v United States*, the Court held that redistricting – by its nature, without regard to its particular circumstances – possesses a potential for discrimination.

The *Perkins* Court approvingly quoted the originating district judge in the case on the role of the local three-judge district court:

The only questions to be decided by . . . the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964

Perkins, 400 US at 384. The *Perkins* Court expanded on this point by holding that the local district court may not consider

what Congress expressly reserved for consideration by the District Court for the District of

Columbia or the Attorney General – the determination whether a covered change does or does not have the purpose or effect “of denying or abridging the right to vote on account of race or color.”

Perkins, 400 US at 385.

In *Allen* the Court held that a change from district to at-large voting could effect a dilution of voting power; that a change from election to appointment for an office “could be made either with or without a discriminatory purpose or effect;” that increasing the requirements for independent candidates to gain a ballot position has a “substantial impact” on voting; and that a new procedure for casting write-in votes “is different from the procedure in effect when the State became subject to the Act.” *Allen*, 393 US at 569-570. This Court did not, however, determine for itself whether the Mississippi and Virginia changes at issue in *Allen* and its companion cases were in fact discriminatory; that job was properly left, in the first instance, to either the Attorney General or the District Court for the District of Columbia.

In summary, these cases looked to whether the type of change might cause dilution of the black vote somewhere under some circumstances. If it is possible for the local court to hypothesize some circumstances under which the change might cause dilution, then the jurisdiction cannot avoid the simple burden of submitting its election-law change to the Justice Department or District Court for the District of Columbia.

Since the purpose of § 5 was “to shift the advantage of time and inertia from the perpetrators of the evil to its victims,” *South Carolina v Katzenbach*, 383 US 301, 328

(1966), the meaning of the holding in *Dougherty* becomes clear. The plaintiffs need only show that the enactment is of a type that *could be* discriminatory. The plaintiff is not required to show that the new enactment actually is discriminatory; if that were the standard, every § 5 enforcement proceeding would be turned into a § 2 case.

In these cases, if the district court had looked only at the nature of the changes, rather than at possible justifications for the changes, the district court would have concluded there was a potential for discrimination in the following ways:

(1) Just as the voting power of the black electorate is submerged when at-large elections are used where there is racially polarized voting,¹² the change from a district road system to a unit system may dilute the voting power of a black electorate concentrated in a single district. In an at-large election, blacks may be unable to elect representatives of their choice; if the county adopts single-member districts for elections and a unit system for road work, black voters may be unable to have their elected representatives carry out the policies desired by the black electorate.

(2) Changing from individual district decisions to group (i.e., commission) control over all decisions submerges the political power of the district constituency by making such decisions dependent upon the votes of six

¹² For this reason a change from district to at-large elections must be precleared. *Allen*, 393 US 544.

commissioners, five of whom were not answerable to the voters in the particular district.¹³

(3) If a minority group was able to turn to one sympathetic person on a county commission, and the commissioner was able to respond to the minority's particularized needs, a change to group decision making would submerge the power of that commissioner, without regard to the method of election of commissioners.

(4) Under district-based decisions, individual commissioners could use their road budgets to bargain with other commissioners for constituent services of all sorts. The change to group-based decision making changes that balance of power, so that the commissioners representing black voters have no bargaining power unless the commissioners of the white districts are divided on an issue. As Justice Scalia, joined by the Chief Justice and Justices O'Connor and Kennedy, recently noted in his dissent,

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. . . . The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

¹³ The last three aspects of the appropriation and expenditure process can also be found in the block grant programs of the federal government. Under such programs a fund of money is divided among the several States, with each State deciding how the money is to be spent within that State. The recipient of the block grant (a State or one commissioner) has the freedom to respond to local constituents in deciding how to spend the block grant within the State or commission district.

Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking control back "downtown."

Rutan v Republican Party of Illinois, __ US __, 111 LE2d 52, 88 (1990) (citations omitted).¹⁴

This case is about an analogous form of political power: the ability of commissioners to act with relative autonomy within their own districts so they may provide services useful to their black constituents, but which a white-majority commission or county engineer may not provide to black constituents.

B. Congress drafted § 5 to centralize consideration of substantive issues in two fora: the District Court for the District of Columbia and the Attorney General.

Congress has given a "substantial" watchdog responsibility to the U.S. District Court for the District of Columbia and the Attorney General of the United States to ensure that covered jurisdictions do not implement changes affecting voting unless and until state or local

¹⁴ Zora Neale Hurston, an African American writer, made the same point in one of her novels: "Yo' common sense oughta tell yuh de white folks ain't goin' tuh 'low [a colored man] tuh run no post office." Zora Neale Hurston, *Their Eyes Were Watching God* 37 (First Perennial Library ed. 1990).

officials demonstrate they are free from discriminatory purpose or effect. The Section 5 preclearance process "is perhaps the most stringent . . . and certainly the most extraordinary" of the new remedies adopted by Congress in 1965 "to 'banish the blight of racial discrimination in voting' once and for all." *McCain v Lybrand*, 465 US 236, 244 (1985), quoting *South Carolina v Katzenbach*, 383 US 301, 308 (1966). For the express purpose of radically reversing the time-consuming, expensive, and legally burdensome method of challenging proliferating changes in voting practices case by case, Congress designed a novel preclearance procedure that was supposed to place all the burdens of proof and delay on the covered jurisdictions. *McCain v Lybrand*, 465 US at 243-44. The sheer number of such changes and the recalcitrance of covered jurisdictions, which have failed or refused even to submit many changes for preclearance, has seriously strained the Attorney General's limited resources.

This Court recently acknowledged that the Attorney General cannot and usually does not monitor each jurisdiction to make sure all changes affecting voting are being submitted for preclearance. *Clark v Roemer*, 59 USLW 4583, 4586 [slip opinion at 11-12] (June 3, 1991). Consequently, private citizens have been forced into the role of policing covered jurisdictions simply to get changes submitted under Section 5 and to prevent their implementation prior to preclearance. Private litigants must turn to the local federal district courts for this limited, threshold enforcement function. *Allen v State Board of Elections*, 393 US 544 (1969).

Local district courts who overstep their narrowly restricted roles in Section 5 actions "upset[] this ordering

of responsibilities under § 5[,] diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and . . . create incentives for them to forgo the submission process altogether." *Clark v Roemer*, 59 USLW at 4586 [slip opinion at 11-12]. The district court's rulings in the instant cases encourage covered jurisdictions to give themselves the benefit of the doubt about the need to preclear changes in the powers of government officers. Even requests for submission by the Attorney General can be ignored with impunity. Private citizens will have to institute three-judge court actions and bear the burden of convincing local district judges that something approaching a likelihood of significant discrimination exists before the covered jurisdictions need begin the preclearance process. Meanwhile, the changes already will have been implemented, making it likely the local district court will permit implementation to continue during the preclearance process. See *Clark v Roemer*, 59 USLW at 4584 [slip opinion at 4].

As the majority opinion below demonstrates, the use by local district courts of the "potential for discrimination" inquiry is threatening to create a burgeoning new body of Section 5 caselaw, one that is largely independent of, but parallel to, the substantive principles developed by the decisions of the D.C. District Court and the decisions and regulations of the Attorney General. All three of the district judges below agreed that it is usually impossible to dissociate "potential for discrimination" inquiries, as they understand them, from substantive analyses of discrimination in fact. JS A-22 n.21 (majority opinion) and A-30 (Thompson, J., dissenting). Unless this Court acts decisively to stop it, most future developments

in Section 5 law will take place in local district courts, which lack jurisdiction to make substantive determinations about the nature or scope of violations. Private plaintiffs rather than covered jurisdictions bear the burden of proving discriminatory circumstances. Covered jurisdictions will be able to avoid bearing the burdens of time and inertia.

In *Houston Lawyers' Ass'n v Attorney General of Texas*, 59 USLW 4706 (June 20, 1991), this Court emphasized (in a § 2 context) the importance of separating "the threshold question of the Act's coverage" from substantive issues about whether a violation has occurred. *Id.* at 4708 [slip op. at 6]. See also *Chisom v Roemer*, 59 USLW 4696, 4698 [slip op. at 9] (June 20, 1991).¹⁵ Complex factual issues and policy considerations are properly reserved for plenary evidentiary proceedings to determine whether the Act has been violated. Engaging these issues at the threshold of coverage procedurally frustrates the broad remedial purpose of the Voting Rights Act. This is so particularly in the § 5 context, where Congress has explicitly restricted authority to determine violations to the D.C. District Court and the Attorney General, leaving local district courts with the limited responsibility of facilitating the work of the D.C. fora by requiring covered jurisdictions to submit all changes that may affect the voting rights of protected minorities.

Congress excluded local district courts from § 5's enforcement mechanism because it wanted to centralize

¹⁵ The question before the Court in *Chisom* involved only the scope of coverage of § 2, making it unnecessary to address the elements of proving a violation or providing a remedy.

in Washington a uniform body of case precedents. It also distrusted the ability of district courts in the covered jurisdictions to afford sufficient weight to the national voting rights priorities embodied in § 5's extraordinarily intrusive procedural and substantive measures.¹⁶ The institutional difficulties Congress feared in local courts are apparent in the split decision below. The majority below simply was unprepared to accept the plain language of § 5's sweeping command, reaffirmed by this Court's decisions, when it engaged in a balancing of the white community's "goodgovernment"¹⁷ agenda with the right of blacks to have effective and responsive representatives.¹⁸ The district court majority confessed that in

¹⁶ In *McDaniel v Sanchez*, 452 US 130, 151 (1981), this Court stated, "Because a large number of voting changes must necessarily undergo the preclearance process, centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way." The next year, Congress rejected proposals to allow local district courts to hear § 5 suits. S. Rep. No. 417, 97th Cong., 2d Sess. 58-59 (1982); H.R. Rep. 227, 97th Cong., 1st Sess. 36 (1981). The Senate overwhelmingly rejected an amendment which would have allowed any "appropriate district court" to hear suits under § 5 of the Act. 128 Cong. Rec. S6977-6982 (1982).

¹⁷ Flannery O'Connor, "The Barber," in *The Complete Stories* 15, 20 (1971).

¹⁸ As examples of the district court's intrusion into the merits of the Russell County Commission's rationales for its changes, note the following: the district court majority held the potential for diminution of blacks' voting rights "pales," JS A-19, in comparison with legitimate local government reforms that discouraged "corruption in Russell County's road operations," JS A-3, that replaced political "horse-trading," JS A-19, with more efficient systems that "consolidated the road shops . . . and streamlined the road work force," JS A-4, and that

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balancing the concern of freeing covered jurisdictions from unnecessary federal interference against what this Court has called "the prophylactic purpose" of § 5,¹⁹ it was opposed to "automatically expanding, where in doubt, the scope of [§ 5] coverage" JS A-22 n.20.

When it drafted § 5 of the Voting Rights Act, Congress exercised its enforcement powers under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment and made political policy decisions about the proper fora for enforcing the preclearance provisions.²⁰ Federal courts are bound to respect this legislative choice and to enforce it both in letter and in spirit. Local district courts still have important roles to play enforcing other provisions of the Voting Rights Act, particularly § 2, where private litigants bear the burden of convincing local judges, conducting "intensely local appraisals," that existing practices impair blacks' access to the political process. *Thornburg v Gingles*, 478 US 30 (1986). But Congress has placed a clear responsibility on covered jurisdictions that seek to *change* existing practices that may affect the voting rights of black citizens; they must bear

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changed budget-setting priorities "from a system of designating funds on a district-by-district need basis to one of designating funds on a county-wide need basis without regard to district lines," JS A-7. Each of these is a determination which is left by § 5 to the District of Columbia court or the Attorney General.

¹⁹ *McCain v. Lybrand*, 465 U.S. at 245.

²⁰ *South Carolina v Katzenbach*, 383 US 301 (1966); *Georgia v United States*, 411 US 526 (1973); *City of Rome v United States*, 446 US 156 (1980).

the burdens of proof, time, and inertia in a national forum before implementing these changes. *McCain v Lybrand*, 465 US 236, 243 (1984), citing *South Carolina v Katzenbach*, 383 US 301, 328 (1966). The danger of the decisions below and other § 5 decisions like them from local district courts²¹ is that the carefully crafted and demanding preclearance enforcement scheme designed by Congress will be seriously, perhaps fatally, side-tracked. If so, black citizens in covered jurisdictions will lose what arguably has been the most powerful and effective mechanism for safeguarding the right to vote ever enacted.

C. The local district court improperly considered the substantive issues relating to the voting law changes in the instant appeals.

The district court in the instant case, referring to this Court's opinion in *McCain v Lybrand*, 465 US 236, 250 n.17 (1985), quickly acknowledged that, as " 'reallocation[s] of authority' among government officials or bodies," the Russell County and Etowah County changes at issue here "may constitute changes affecting voting under section 5." JS A-10 (emphasis added). This conclusion by itself was enough to trigger § 5, and the local district court should have proceeded no further. *Every* change affecting voting is required by statute to receive preclearance, even one that seems innocent of discriminatory purpose or effect. Only the D.C. District Court and the Attorney

²¹ See, e.g., *Connor v Finch*, 431 US 407 (1977), listing the 14-year history of the recalcitrance of a Mississippi three-judge district court.

General are empowered to declare the change free of discrimination. Congress established the procedure requiring the Attorney General to object within sixty days of submission to serve as "a speedy alternative method of compliance" that would not "unduly delay implementation of nondiscriminatory legislation. . . ." *McCain v Lybrand*, 465 US at 246, quoting *Morris v Gressette*, 432 US 491, 503 (1977).

Put differently, the threshold question of coverage was fully resolved once the district court below found that the changes at issue had "the nature of the changes in election practices . . . which required preclearance. . . ." *McCain*, 465 US at 250 n.17 (emphasis added). By extending its inquiry into the factual circumstances of these particular changes in quest of "the potential for discrimination," the court below necessarily entered the realm of "substantive consideration" about the existence of a violation reserved for the D.C. fora (as the district court actually admitted when it launched its search for the proper "benchmark for comparison," JS A-9). Some reallocations of governmental authority may have no conceivable adverse impact on minority voting rights or may be so attenuated in their impact on voting rights that, notwithstanding the fact they affect the powers of elected representatives, they undoubtedly do not violate § 5. But that is not for the local district court to say.

There is no escaping the conclusion that the district court in this case went far beyond the question of § 5 coverage, that is, whether each challenged change was a "standard, practice, or procedure with respect to voting," 42 USC § 1973c. Rather, the court impermissibly determined, on the facts of these cases, that violations of law

were unlikely. Nothing makes this clearer than the majority opinion's disclaimers of having prejudged plaintiffs' § 2 claims against the very same voting practices that remain for the single-judge court. The majority said it had not reached the issues of whether the unit system "has in fact been administered with the purpose or effect of racial discrimination," JS A-18 n.17, or "whether black voters are denied equal voting rights under the governmental regimes currently prevailing in Russell or Etowah Counties." JS A-21-22 n.20. It claimed only to have decided "whether the disputed changes in this case have any potential impact on voting sufficient to raise them to the level of 'changes affecting voting.'" *Id.* Since, as the district court correctly held in this case, appellants are not foreclosed from showing at a full trial on their § 2 claims, that the changes in Russell and Etowah Counties have resulted in a dilution of their voting strength, then as a matter of logic the district court erred in finding that there was no potential for discrimination.

This is not a situation where black citizens can hope to use a § 2 action effectively to override the Attorney General's decision to grant § 5 preclearance to a challenged voting change.²² Instead, a federal court has held that, regardless of what evidence is later adduced, the change could not possibly cause discrimination. Moreover, in § 5 proceedings, a change should be denied preclearance if racial discrimination inheres in the practice

²² Cases in which private citizens won § 2 cases after the Attorney General had interposed no § 5 objection include *Major v Treen*, 574 FSupp 325 (ED Lou 1983), and *Thornburg v Gingles*, 478 US 30 (1986).

itself, regardless of whether the change has aggravated the discriminatory impact.²³

1. The district court's consideration of the merits of the Russell County changes

The district court plunged into the forbidden consideration of substantive violations when it assessed the 1979 Russell County change, not to determine whether it affected voting, but to decide whether or not there had been a "change in the potential for discrimination against minority voters." JS A-16 (emphasis in original). Without the aid of a plenary evidentiary hearing, the court made a factual determination that black voters lost no significant influence over road and bridge operations when management was transferred from the commissioner residing in their district to an engineer appointed by the commission majority. JS A-16-17.

Once it crossed into violation-assessment territory, the district court majority then refused to apply the substantive standards announced by the Attorney General. Without a word of explanation, the court completely ignored the rule of "substantive consideration" it had

²³ 28 CFR § 51.55(b)(2) (1987): "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance." This was adopted after Congress endorsed a similar standard. S. Rep. No. 417, 97th Cong., 2d Sess. 12 n. 31 (1982).

recognized earlier in its opinion, that the challenged change must be compared with the precleared practices in effect at the time of submission, not those in effect at the time of enactment. JS A-9-10. The potential for discrimination against black Russell County voters if road and bridge authority was shifted from a single-member district commissioner to the county engineer "is too obvious to require discussion." JS A-16. But the court found irrelevant a court-ordered single-member district election system that had been precleared in 1985, because it was not used in 1979 when the unit system change was made.

By ruling that the 1979 unit system change was beyond the scope of § 5, the district court relieved the Russell County government of its statutory burden of demonstrating that it had neither the purpose nor the effect of diluting black electoral strength – and foreclosed the opportunity for black citizens to convince the Attorney General or the District Court for the District of Columbia that it did have such purpose or effect. The decision thus pretermits consideration of possible factual circumstances like the following:

(1) Even though all the road commissioners had been elected in countywide voting, the district residency requirement by custom and practice made them particularly responsive to the voters in their residency districts, and as a practical matter black voters, most of whom reside in one district, lost political influence over road and bridge operations when authority was shifted to the county engineer.

(2) The county commissioners and local legislators anticipated in 1979 the coming court-ordered change to single-member districts that would allow black voters to elect one or more representatives of their choice. As of 1979 the Fifth Circuit recently had affirmed the district court judgment striking down at-large elections in Mobile,²⁴ and district courts had ordered single-member districts in several Alabama jurisdictions, including the State legislature.²⁵ The District Court found in *Dillard*, 640 FSupp at 1356-57 – a case in which Etowah County Commission was a defendant – that the Alabama legislature was well aware of the potential electoral strength of blacks and had enacted laws on a variety of occasions so that blacks would not have electoral influence even if they obtained full and free access to the ballot. The transfer to the county engineer of authority over road and bridge operations was intended to head off the possibility that a black commissioner would have run these operations in his or her own district – which would have been

²⁴ *Bolden v City of Mobile*, 571 F2d 238 (5th Cir 1978), aff'g 423 FSupp 384 (SD Ala 1976), rev 446 US 55 (1980), vac and rem 626 F2d 1324 (5th Cir 1980), after remand by US Supreme Court, 542 FSupp 1050 (SD Ala 1982); *Brown v Moore*, 428 FSupp 1123 (SD Ala 1976), vac. & rem. sub nom. *Williams v Brown*, 446 US 236 (1980), after remand by US Supreme Court, 542 FSupp 1078 (SD Ala 1982), aff'd 706 F2d 1103 (11th Cir 1983), aff'd mem. sub nom. *Board of School Comm'rs v Brown*, 464 US 1005 (1983).

²⁵ *Corder v Kirksey*, 585 F2d 708 (5th Cir 1978); *Robinson v Pottinger*, 512 F2d 775 (5th Cir 1975); *Hendrix v McKinney*, 460 FSupp 626 (MD Ala 1978); *Sims v Amos*, 340 FSupp 691 (MD Ala 1972), 365 FSupp 215 (1973) (3-judge court); *Broadhead v Ezell*, 348 FSupp 1244 (SD Ala 1972).

the case after the *Dillard* decree became effective in 1985. In this event, the county would have adopted the 1979 change to a county "unit system" for an unlawfully discriminatory purpose.

2. The district court's consideration of the merits of the Etowah County changes

Similarly, the district court's absolution of the 1987 Common Fund Resolution rammed through by the four holdover commissioners in Etowah County, over the vigorous objections of the new single-member district commissioners, foreclosed plenary consideration of the following evidentiary scenarios:

(1) Even if, in theory, the power of a single commissioner to control road and bridge spending within his district seems "minor and inconsequential" in comparison to the total commission's power to allocate funds among the districts, in fact and in practice it was a critical component of the four holdovers' road and bridge monopoly, which the district court found to have a "blatant and obvious" potential for discrimination, JS A-20.

(2) Like the Russell County situation, Etowah County's white commission majority adopted the common fund resolution for the racially discriminatory purpose of preventing the representative of black voters from controlling even a part of the road and bridge budget.

The Etowah Common Fund Resolution is different from the "benchmark" to which any new enactment must

be compared.²⁶ In this case, the benchmark would be the *Dillard* decree, under which the commissioners elected from Districts 5 and 6 "shall have all the rights, privileges, duties and immunities of the other commissioners, who have heretofore been elected at large, until their successors take office." At the time the *Dillard* decree became effective, commissioners had the power to make resource-allocation decisions for their districts. The 1987 resolutions, together and separately, deprive the commissioner elected by blacks of that power.

The district court in this case strayed over the line into the territory reserved for the D.C. District Court and the Attorney General by deciding, with regard to Etowah County, that "the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant. . . ." The district court did not hold that the Common Fund Resolution lacked the "potential for discrimination," but that it was insignificant. This Court has dealt in the past with election changes that might strike some as "insignificant" – the transfer of a polling place, *Perkins*, changes in personnel regulations, *Dougherty*, the extension of city limits to include uninhabited territory, *City of Pleasant Grove v United States*, 479 US 462 (1987) – but this Court has held firm to the standard first expressed in *Allen* that even "minor" changes affecting elections and voting must be precleared.

²⁶ 28 CFR § 51.54(b). See also, supplemental information to § 5 regulations, 52 Fed Reg 486, 487 (6 Jan. 1987), citing *Beer v United States*, 425 US 130, 140-42 (1976); *City of Lockhart v United States*, 460 US 125, 131-36 (1983).

D. The district court should have accorded deference to the decision of the Attorney General that the changes in this case must be submitted under § 5.

A decision of a local district court to deny an injunction under § 5 is a *de facto* preclearance of the election law change. Since the Attorney General has the primary enforcement responsibility under § 5, his decisions about the coverage of the Act ought to be given great deference. In *United States v Sheffield Board of Comm'rs*, 435 US 110 (1978), this Court held it should accord deference to the Attorney General's interpretation of the Act's coverage, especially considering the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress. In *NAACP v Hampton County Election Commission*, 470 US 166, 179 (1985), the Court based its decision in part on the Attorney General's prior determinations that § 5 covered changes in election dates. In *Dougherty County Board of Education v White*, 439 US 32, 39 (1978), the Court specifically cited the Attorney General's request that a personnel rule be submitted under § 5 as an "interpretation . . . entitled to particular deference." In *Perkins v Matthews*, 400 US 379, 390-94 (1971), the Court decided that "location of polling places and municipal boundary changes come within § 5" after citing prior decisions of the Attorney General to the same effect and noting that the Court pays great deference to the decisions of the Attorney General in the interpretation of the Act.

The balance of equities is clear. On the one hand, if the local district court enjoins a change that ought not be considered by the Attorney General, the State or locality

has been denied the right to enforce its new law or practice for only 60 days. If the Attorney General determines that preclearance is not required, he can notify the jurisdiction immediately. On the other hand, the decision below in this case sends the message that some election law changes are *de minimis*. If jurisdictions decide that they, rather than the Attorney General, will choose which election-related changes should be submitted, the minority citizens of the jurisdiction may be denied the rights guaranteed by § 5. The Court discussed the Attorney General's lack of resources to discover all changes that *should be* submitted in *McCain v Lybrand*, 465 US 236, 248-49 (1984). Section 5 can only work if States and localities submit election-law changes. "In the legislative history of the Act, § 5 has been deemed to be a 'vital element' of the Act to ensure that 'new subterfuges will be promptly discovered and enjoined.' But Congress recognized that it was only as vital as state compliance allowed it to be." *McCain*, 465 US at 248 (citation omitted).

II. The district court improperly departed from this Court's prior decisions requiring a State to preclear a transfer of responsibilities from elected to appointed officials or changes in powers of officials.

The protection given appellants under the Voting Rights Act extends beyond simply requiring the use of single-member districts in electing the Etowah and Russell County Commissions. The right to vote includes "all action necessary to make a vote effective." *Allen*, 393 US at 565-66 (1969), citing § 14 of the Voting Rights Act,

42 USC § 1973l(c)(1), and *Reynolds v Sims*, 377 US 533, 555 (1964). "The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen*, 393 US at 569.

A. This Court has held that the reallocation of power from one public official to another must be submitted for preclearance under § 5.

One of the three cases decided with *Allen* was *Bunton v Patterson*, in which the plaintiffs alleged that the State of Mississippi had violated § 5 of the Voting Rights Act by not seeking preclearance of a law requiring eleven counties to appoint, instead of elect, the county superintendent of education. *Allen*, 393 US at 550-551. This Court agreed and held, "an important county officer in certain counties was made appointive instead of elective. The power of a citizen's vote is affected by this amendment; after the change, he is prohibited from electing an officer formerly subject to the approval of the voters." *Allen*, 393 US at 569-570.

If the State of Alabama had changed the office of Russell County commissioner from elective to appointive, it would have had to obtain preclearance. Similarly, the State must obtain preclearance if it shifts powers to an appointive officer while continuing to elect the officer from whom the powers were taken – that is, when it use indirect means to accomplish the goal of removing voter control over the official exercising significant powers. In the present case, the voters continue to elect county commissioners, but the most significant power formerly held by those commissioners has been shifted to the county

engineer, over whom the voters have no direct control. The net result of the Russell County change is the same as in *Bunton* – less power for the voters over their local affairs.

In *McCain v Lybrand*, 465 US 236 (1984), this Court considered whether a change in county government from two appointed and one elected member to three elected members had to be submitted under § 5 and held,

While this matter may be more fully explored in future proceedings after remand, several changes [covered by § 5] are suggested: . . . the basic reallocation of authority from the state legislative delegation to the Council, [and] the shift from two appointed Board positions to at-large election of their Council counterparts. . . .

McCain, 465 US at 250 n.17. Surely, if a change from appointment to election must be precleared, a transfer of power from an elected to an appointed official must similarly be submitted for preclearance.

B. District courts hearing similar matters have likewise held that changes in the allocation of governmental powers require preclearance.

In *Horry County v United States*, 449 FSupp 990 (D DC 1978) (3-judge court), the court held a South Carolina statute was a change in electoral practices requiring preclearance because it provided for the election of public officials who formerly were appointed by the Governor.

An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental

powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements. Cf. *Perkins v Matthews*, [400 US 379 (1971)]; *Allen v State Board of Elections*, *supra*.

449 FSupp at 995. See also, *County Council of Sumter County v United States*, 555 FSupp 694 (D DC 1983) (3-judge court) (preclearance required of a law that eliminated the legal power of the governor and general assembly over local affairs and vested it exclusively in a county council elected at large by county voters).

Addressing a change resembling that effected by Act 79-652, the *Horry County* court also held that the statute required preclearance because it changed the duties of the chairman of the county council. *Horry County*, 449 FSupp at 995. The chairman previously had authority to direct the construction and repair of all roads and bridges in the county and supervise the employees engaged in such work, subject to the approval of a majority of the Board. The new statute assigned the chairman no powers or authority different from those of the other council members. *Horry County*, 449 FSupp at 993-94. The new statute also gave the county council additional taxing, legislative and administrative duties which were not provided under the previous statute. *Horry County* at 994.

The duties of the chairman of the former Horry County Board of Commissioners and those of the chairman of the Horry County Council under Act R546 are sufficiently different that in this respect also Act R546 constitutes a change in electoral practices requiring preclearance under Section 5 of the Voting Rights Act –

unlike the two at large council seats in *Beer v United States*, . . . 425 US [130] at 139 [(1976)], which underwent no change at all.

Horry County, 449 FSupp at 995-96.

In *Hardy v Wallace*, 603 FSupp 174, 178-79 (ND Ala 1985) (3-judge court), the court held that the State of Alabama must preclear a statute which changed the appointive power over a local racing commission from the local legislative delegation to the governor. Writing for the court, the late Judge Robert S. Vance noted that "the most relevant attribute of the challenged act is its effect on the power of the voters rather than any aspect of the electoral process." *Hardy*, 603 FSupp at 178. Similarly, the power of the voters in black-majority districts to choose a commissioner who will follow their wishes and have the power to do so is a relevant attribute of the prior situations in Etowah County and Russell County.

III. The district court decision regarding Russell County conflicts with decisions of this Court and the regulations of the Department of Justice regarding the proper "benchmark" for comparison of an unprecleared change in election-related law.

The argument in this section addresses an issue the district court should not have reached, namely, the likelihood the challenged Russell County change might violate the substantive prohibitions of Section 5. Thus, it is not in a posture for consideration by this Court. It is briefed here strictly in the alternative event that this Court nonetheless decides to consider the question.

The district court recognized the appropriate statutory test when it stated:

[I]n assessing the discriminatory or retrogressive effect of a change, the proper benchmark for comparison is the regime 'in effect at the time of the submission,' taking into account duly precleared changes which have occurred subsequent to the original statutory benchmark date.

We therefore measure the purported changes in this case against the benchmark of the 1964 regime as modified by any intervening duly precleared changes.

JS A-14-15. But it nonetheless ignored this test in analyzing the change in Russell County.

In *City of Rome v United States*, 446 US 156 (1980), this Court explained that when a change is not submitted until years after its enactment, the change is to be analyzed in light of the now-existing system rather than in light of the system existing at the time the unprecleared change was enacted. This Court held,

Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data.

Rome, 446 US at 186. The district court in *Rome* had used the current perspective because § 5 "requires, in the future tense, that the plaintiff jurisdiction demonstrate that its voting changes 'will not' have a discriminatory effect," *City of Rome v United States*, 472 FSupp 221, 246 (D DC 1979) (3-judge court) (emphasis in original). The

Department of Justice regulations governing § 5 submissions have codified this standard. 28 CFR § 51.54(b) provides, in part, as follows:

(1) In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure *in effect at the time of the submission*. If the existing practice or procedure was not in effect on the jurisdiction's applicable date for coverage . . . and is not otherwise legally enforceable under Section 5, it cannot serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

(2) The Attorney General will make the comparison based on the *conditions existing at the time of the submission*. [Emphasis supplied.]

Despite its citation of the correct standard, the district court failed to follow the standard.

In 1964 the Russell County Commission had three members elected at large from residency districts; within each residency district the commissioner controlled road work, JS A-2. In 1985 the commission was enlarged to seven members, elected from single-member districts; this change was precleared, JS A-4. Thus, today "the 1964 regime as modified by any intervening duly precleared changes," JS A-15, is seven single-member districts with each commissioner having control over road construction and maintenance in his or her district.

Rather than judging whether the change to a county unit system affects voting in the context of the 1985 precleared change to single-member districts, the district court incorrectly judged the county unit system as if it

affected only an at-large system. The district court was deciding whether it would have required the county unit system to be submitted for preclearance in 1979 without regard for the events that have occurred since then. The district court committed clear error by centering its attention only on the conditions immediately "before and after the 1979 change," JS A-21, when the county commission was still elected at large.²⁷

Since "the question [in a § 5 injunction action] is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination," *Dougherty County Board of Education v White*, 439 US 32, 42 (1978) (emphasis in original), the court must look at all evidence that might demonstrate a potential for discrimination. The law is "a ass and a idiot"²⁸ if the court must blind itself to *actual* discrimination by pretending that it would not have seen the *potential* for that discrimination several years earlier.

CONCLUSION

For the reasons stated in this brief, the appellants pray that the Court will reverse the decision of the United States District Court for the Middle District of Alabama and remand this action with instructions to issue the

²⁷ Under the principles discussed in Section I and II of this brief, even in 1979 the Russell County changes should have been submitted for preclearance.

²⁸ Charles Dickens, *Oliver Twist*, Chap. 51 (1837-38).

injunctions prayed by the appellants against the enforcement of the Etowah County Common Fund Resolution and Alabama Act 79-652.

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